UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

-vs- **Case No. 6:11-cv-1186-Orl-28TBS**

DIRECT BENEFITS GROUP, LLC; VOICE NET GLOBAL, LLC; mo netary

equitable relief against four corpor

arguments and proposed findings of fact and conclusions of law.[3]

Upon consideration of the evidence and testimony presented, argument of counsel, and the parties' proposed findings and conclusions, I issue the following opinion in accordance with Federal Rule of Civil Procedure 52. I conclude that the FTC has met its burden of proving by a preponderance of the evidence that the Defendants engaged in unfair and deceptive practices

loan applications and placed 594,956 applications with lenders. (Tr. Day 3 at 111 (Wood Test.)).[4]

Each of the discount programs—Thrifty Dial, Voice Net Global, Direct Benefits Online, and Unified Savings—offered long-distance service; members were provided with an 800 number and a PIN code, after which they could make

During the loan application process, the websites presented the consumers with offers for the discount programs through banner ads and pop-up boxes. If consumers knowingly or unwittingly enrolled in the programs in the course of submitting their payday loan applications, debits for the discount programs' monthly or annual fees were made from the bank accounts listed by the consumers on the payday loan applications. Initially, the discount programs were offered at a monthly fee ranging from $39.95 to $59.90. However, sometime in 2010, Wood came up with the idea to change from a monthly fee model to an annual fee model, (Tr. Day 3 at 189 (Berry Test.)), and the memberships then were offered—and bank accounts then were debited—for annual fees ranging from $98.40 to $99.90.

These debits sometimes came as a surprise to consumers, who often had not realized that they had enrolled in a discount program rather than merely submitting a payday loan application. Additionally, the debits sometimes resulted in bank overdraft charges for the consumers; those who had not realized they had enrolled were not expecting such a charge, and many of these payday loan seekers did not have enough money in their bank accounts to cover the debits. When consumers discovered debits from their bank accounts that they did not recognize, they typically contacted their banks or the Defendants or made complaints to Better Business Bureaus ("BBBs") or government entities, including the FTC. The FTC began investigating the matter in the spring of 2011 and filed this lawsuit in July 2011. Contemporaneous with the filing of its Complaint, the FTC sought and was granted a temporary restraining order with an asset freeze, and a receiver was appointed. (Doc. 15). A month later, a preliminary injunction was entered, (Doc. 71), and the case proceeded to

as soon

up box above the OK and Cancel buttons was a block of text that read:

> ATTENTION:
>
> Read below before pressing OK
>
> Press OK to submit your loan application and still take advantage of Thrifty Dial. By pressing OK, you agree you have read and understood and accept all terms for this cash advance offer, as well as all

OK would change his previous choice not to buy Thrifty Dial and that cancel "would actually continue [him] down the path that [he] had already taken of . . . not wanting the upsell." (Id.).

Ultimately, Tyndall pressed the Enter bar to continue, understanding that the enter

After Tyndall hit the Confirm button, two things occurred—first, the screen automatically scrolled to the top, and second, a pop-up box appeared. (Id. at 134). At the top of the page was a yellow dialogue box that stated: "Congratulations, please confirm the information below. Submit to begin your loan process." (Id.; Pl.'s Ex. 38 at E5). The pop-up box—like the pop-up box in the first buy—contained two options, "OK" and "Cancel." (Tr. Day 1 at 134; Pl.'s Ex. 38 at E5). It contained similar wording as well:

ATTENTION:

Read below before ppTr.

citywestfinancial.com. (Tr. Day 1 at 136). He completed the payday loan application and encountered an advertisement for Unified Savings with the unchecked check box and "select box below" message he had seen during his second buy. (Id. at 137; Pl.'s Ex. 39 at F2). Tyndall again left the box unchecked and clicked the green "Confirm" button. (Tr. Day 1 at

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appeared to be from a non-Defendant. (Tr. Day 1 at 143-44; Pl.'s Ex. 39 at F12). Tyndall ceased the third undercover buy at that point. (Tr. Day 1 at 144).

On cross-examination, Tyndall acknowledged that the pop-up box with the OK and Cancel buttons took up approximately the middle third of the computer screen and was in English, in a font that was large enough to read. (Id. at 180). Tyndall stated that he "eventually" came to the conclusion—after reading the box several times—that by clicking OK he would be signing up for a year of services and that by clicking Cancel he would be rejecting it. (Id. at 181-82). After doing that, he anticipated that his undercover bank account would indeed be debited, and three weeks after the first buy, it was. (Id. at 182-83). Tyndall also explained that when he conducted the third buy, he used a different workstation, which had a different version of the Firefox web browser on it than had the workstations he had used previously. (Id. at 187-88). Using that version, he had to scroll down to read the full contents of the pop-up box. (Id. at 189).

Defendants Wood and Berry testified regarding their decision to use the "OK" or "Cancel" pop-up box on the websites, which they clarified is not a "pop-up window" that would be blocked by a pop-up blocker and which they referred to as a "confirm box." Berry explained that this "confirm box" is a standard Javascript call that is available on all common browsers. (Tr. Day 3 at 166). As stated by Berry, in light of the variety of available browsers and the advent of mobile devices, it is challenging to build a website that will work on all different browsers, and they employed this confirm box because it would work across various devices, including mobile devices, iPads, tablets, and older browsers. (Id. at 166-169, 221-22). This confirm box forces an interaction because the user cannot close the box

without closing the entire screen—unless the browser or entire screen is closed, either OK or Cancel must be chosen for the confirm box to go away. (Id. at 38-40 (Wood Test.); id. at 168 (Berry Test.)).

Berry further explained that he could not change the labeling of the buttons when using this confirm box; he could not, for example, change "OK" to "Yes." (Id. at 168). However, he and Wood did have control over the text that appeared in the box. (Id.). Wood wrote the text that appeared in the box and elsewhere on the webpages, and it was Wood's ultimate decision as to what was put on the webpages and how the content was positioned on the pages. (Id. at 141-42). Wood gave Berry the text to put into the pop-up box, and Berry defined, technologically speaking, what would happen after a customer hit "OK" or "Cancel." (Id. at 218-19).

Berry also testified regarding Tyndall's account of the third buy, in which Tyndall encountered a pop-up box that required scrolling to reveal all of the box's contents. Berry had not previously seen that occur, and Berry explained that Tyndall was using a beta version of Firefox during that buy; according to Berry's user records—which indicate operating systems and browsers of users—Tyndall was the only customer who used that version. (Id. at 177, 178, 180).

III. Consumer Testimony

Eight consumers testified at trial regarding their experiences with Defendants' websites and enrollment in the discount clubs. All of these consumers filled out payday loan applications on one of WKMS's websites and later discovered debits from their bank accounts that they did not recognize. Three of the eight recalled seeing a pop-up box but

did not read the contents of the pop-up box. (Tr. Day 1 at 27-28, 33 (Nokes Test.); id. at 54 (Hill Test.); id. at 77, 79 (Love Test.)). One explained that the box "look[ed] like a normal 'I accept these terms and conditions'" type of box, and she assumed it was part of the terms and conditions of the payday loan, so she pressed OK as the box directed. (Id. at 27-28, 33 (Nokes Test.)). Another did not recognize the pop-up box that she was shown in court as the one she recalled. (Id. at 57-58 (Hill Test.)). The third thought the box had to do with the loan itself, and when she was unable to "x out" of the box, she eventually clicked "OK." (Id. at 63, 77-79 (Love Test.)). The other five consumers did not recall seeing a pop-up box during the loan application process.

Six of the eight testifying consumers received refunds of the debits after they complained to Defendants, BBBs, their banks, or a local law enforcement agency. But, several of those six did not receive refunds of the bank overdraft charges they incurred after their accounts were debited. The other two did not attest to receiving refunds of any charge. Additionally, several of the consumers testified that they ultimately closed their bank accounts and opened new ones, citing concerns about compromised security of their accounts. (See, e.g., id. at 32 (Nokes Test.); id. at 68 (Love Test.); Tr. Day 2 at 8 (Calvo Test.); id. at 27-28 (Madisen Test.)).

In addition to the consumers who testified at trial, the FTC presented declarations of nineteen other consumers. (Pl.'s Exs. 55-61, 63-68, 70-74, & 76). These consumers gave similar accounts of their experiences regarding unknowing enrollment in the discount programs. (See, e.g., Battaglia Decl., Pl.'s Ex. 56, at 2-3 ("I am pretty careful about reading fine print and signing up for things, but I did not notice anything on the site mentioning or

advertising any kind of club, or indicating that by applying for a loan I was authorizing a membership club to withdraw money from my bank account. . . . I eventually got back the money that Direct Benefits took, but I did not get a refund of the overdraft charges from the bank.")).

IV. Email Confirmations and Bank Account Debits

Wood and Berry testified that immediately after a consumer enrolled in one of the discount clubs, an automatically generated confirmation or "welcome" email was immediately sent to the email address that the consumer had included on the payday loan application. (Tr. Day 3 at 66, 69 (Wood Test.); Defs.' Ex. 3; Tr. Day 3 at 174 (Berry Test.)). But, Wood acknowledged that nothing in the emails that were sent—which had the subject line, for example, "Welcome to Unified Savings"—referred to a payday loan or a payday loan application; that he did not know how many of the emails ended up in a spam or junk mail folder; that "there's no process [by] which [they] can know how many consumers actually saw the email"; and that the amount that would be charged was not mentioned until the fourth page of the printed version of the email that was admitted into evidence. (Tr. Day 3 at 131-33; Defs.' Ex. 3). Berry testified that they "did what [they] could" to prevent the emails from ending up in a spam filter. (Tr. Day 3 at 175).

Tyndall, the FTC investigator who testified as to his "controlled buys" and was seeking to purchase the product, did receive a confirmation email on the day of the first buy confirming his purchase of Thrifty Dial in the amount of $98.40. (Tr. Day 1 at 183 (Tyndall Test.)). However, none of the testifying consumers—who, unlike Tyndall, were not seeking to enroll in one of the discount clubs and did not knowingly attempt to enroll—recalled ever

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BBB, she did receive a refund. (Tr. Day 1 at 30-31). Others reported difficulty reaching a live person, rudeness, and that customer service representatives hung up on them. (Tr. Day 2 at 6, 7, & 22 (Calvo and Madisen Test.)).

Gabrielle Lynn, the office manager at Defendants' Bluffdale, Utah office, testified in her deposition that ninety percent of the phone calls received in the office were from complaining or confused customers, fifty percent of whom were "irate." (Lynn Dep., Pl.'s Ex. 49, at 39). Lynn estimated that by July 2011—when calls had dwindled—they were receiving 50 or 60 calls per day. (Id. at 15-16). Complaints also were received via email and regular mail. (Id. at 14-16). Every few weeks, Lynn gave Wood a list regarding how complaints were handled. (Id. at 14). Defendants Berry and Wood acknowledged an awareness that the complaints were being made, but, despite their acknowledged supervisory roles over Lynn, who oversaw customer service, they were unable to estimate the number of complaints received. (See, e.g., Tr. Day 3 at 185 (Berry Test.)).

Additionally, consumers complained to a Minnesota business named Direct Benefits, Inc. ("DBI"), which is not affiliated with Defendant Direct Benefits Group. The owner of DBI, Thomas Mayer, explained during his trial testimony that DBI is a managing general insurance agency that markets insurance products and has nothing to with payday loans, buying clubs, or long-distance telephone service. (Tr. Day 1 at 95-96). In January 2010, DBI began fielding calls, emails, and online chats from consumers asking to have their money returned. (Id. at 96). Initially, DBI told the consumers that DBI had not sold them anything and did not know what they were talking about. (Id.). DBI then did some research and found out about Direct Benefits Online, which was selling "these memberships." (Id.).

Mayer described the complaints that DBI received as "intense" and the callers as "irate." (Id. at 97). Mayer conservatively estimated that DBI received 2,000 complaints about Direct Benefits Group from January 2010 to July 2011. (Id.). During some weeks DBI received as many as fifty calls complaining about Direct Benefits Online. (Id.). There were ten people at Mayer's company, and each one of them might deal with one or two of these calls per day. (Id. at 102-03). The callers began the calls by yelling and screaming at Mayer's staff. (Id. at 97). Some of the callers were distraught and in tears. (Id.). For example, some callers told Mayer that he had stolen $49 out of their checking account without authorization and asked how he had obtained their checking account information. (Id. at 98). DBI employees who took such calls first had to calm down the callers and explain that they had the wrong company; then they gave the callers the phone number and email address of Direct Benefits Online. (Id.).

After the calls started coming in, Mayer contacted Direct Benefits Online and talked to a "woman named Gabrielle"—now known to be Gabrielle Lynn, though she would not tell Mayer her last name when he asked for it. (Id. at 99-100). Mayer suggested that Direct Benefits Online put its 800 number on the checking statements so that the customers would know whom to call. (Id. at 100). He also suggested that Direct Benefits Online update its phone system to state that it was not affiliated with DBI. (Id.). Gabrielle told Mayer that she would talk to the manager and see if there was anything that she could do, but she would not tell Mayer the name of her manager or the owner of the company. (Id.).

Mayer estimated that he spoke to Gabrielle about four times; his office manager also spoke to Gabrielle numerous times. (Id. at 101). At one point Mayer told Gabrielle that

Direct Benefits Online was “killing [his] business” because it was having to field hundreds of calls frofà

Defendants used several different payment processors, including Landmark Clearing and Public Savings Bank, to process the consumer payments for the discount club memberships. (Tr. Day 3 at 124-25 (Wood Test.); Tr. Day 2 at 80 (Barton Test.)). Landmark Clearing terminated its payment processing relationship with Direct Benefits Group in February 2011 based on complaints, overall return percentages, and unauthorized return percentages. (Pl.'s Ex. 42; Tr. Day 1 at 161 (Tyndall Test.)). Similarly, Public Savings Bank, which handled payment processing for Direct Benefits group beginning in the fall of 2010 and for Unified Savings and Thrifty Dial beginning in early 2011, ceased its payment processing relationship with these entities in late June 2011 due to high return rates.[6] (Tr. Day 2 at 80, 94, 98 (Barton Test.)).

Returned transactions represented a variety of situations, as explained at trial largely through the testimony of Jeffrey Barton, who worked for Public Savings Bank from January 2010 to August 2011. (Id. at 74). Barton explained that when a bank processes a check payment for a customer and the check cannot [illegible]

Group, Voice Net Global, Unified Savings, and Thrifty Dial during the time that they did business at Public Savings Bank. (Id. at 79-80, 82; Attachs. to Pl.'s Ex. 102).

The total return rate by check volume for Direct Benefits Group was 54.96%; for Voice Net Global, 58.03%; for Unified Savings, 78.27%, and for Thrifty Dial, 79.86%. (Tr. Day 2 at 81; Attachs. to Pl.'s Ex. 102). The overall rates of return for "account closed"—meaning that the account against which the check was to be posted was closed—for Direct Benefits Group, Voice Net Global, Unified Savings, and Thrifty Dial, respectively, were 7.76%, 9.71%; 10.31%, and 10.90%. (Tr. Day 2 at 82-83; Attachs. to Pl.'s Ex. 102). The respective rates of return for "nonsufficient funds" were 29.51%, 29.75%, 39.89%, and 40.12%. (Tr. Day 2 at 82; Attachs. to Pl.'s Ex. 102). In the category of "not authorized," which Barton explained means that the customer claimed to his or her bank that he or she did not initiate or authorize the transaction, the return rates for Direct Benefits Group, Voice Net Global, Unified Savings, and Thrifty Dial were 2.14%, 1.82%, 3.45%, and 3.46%, respectively. (Tr. Day 2 at 84; Attachs. to Pl.'s Ex. 102). In his trial testimony, Wood acknowledged that these return rates were accurate and that throughout the two years of their operations, the businesses had return rates of approximately 70%. (Tr. Day 3 at 134-37).

In response to the high return rates, Public Savings Bank increased the fees for unauthorized charges, but that did not result in any noticeable change in the amount of returns. (Tr. Day 2 at 91 (Barton Test.)). Additionally, Public Savings Bank received

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not know about the charge or did not authorize it. (Id. at 92). And, in the spring of 2011, the bank received two formal letters—one from Wachovia Bank and one from Bank of America—expressing concern about the number of returns and asking Public Savings Bank to look into it. (Id. at 92-93).

The applications that Defendants filled out with their payment processors reflected that Defendants were anticipating a large percentage of returns. For example, on a Landmark Clearing "Required Survey for High Risk Clients" completed by Wood on behalf of Direct Benefits Group in April 2010, Wood indicated that Direct Benefits Group expected 12,000 check transactions per month and 8000 returns per month, with 50% of those expected to be returned for insufficient funds. (Pl.'s Ex. 30; Tr. Day 1 at 174 (Tyndall Test.)). A survey reflecting the same or expected

business entity Defendants. McDowell testified at trial regarding his receivership activities, which included taking custody and control of the Bluffdale premises. (Tr. Day 2 at 134). When McDowell arrived at the Bluffdale office, he or someone on his behalf interviewed all of the employees on-site—eight in all—including Wood. (Id. at 157-58).

McDowell described Wood as cooperative, and McDowell was given a demonstration of the functioning of the payday loan application websites and the Direct Benefits Online, Unified Savings, and Thrifty Dial offers. (Id. at 158). The activity that had been proscribed by the TRO had ceased about three weeks prior to McDowell's arrival in Bluffdale

entities, with a general flow of funds out of WKMS, Direct Benefits Group, and Voice Net Global to Solid Core and to non-Defendant World Wide Marketing Group, which was also owned by Wood. (Id. at 150). There were transactions back and forth on a regular basis. (Id.).

McDowell was not able to determine that WKMS's business—related to buying and selling payday loan leads—was prohibited by the TRO or was unlawful. (Id. at 168). McDowell accordingly informed Defendants that WKMS could continue to operate so long as Defendants funded it and did not put at risk funds that were seized pursuant to the TRO. (Id. at 165-66). Ultimately, however, Defendants' then-attorney informed

of Voice Net Global, including payment processing applications. (Tr. Day 3 at 197).

The FTC also presented evidence through another investigator, Michael Liggins, regarding Wood and Berry's affiliations with the four businesses, including records from the secretaries of state of Utah and Wyoming. (Tr. Day 2 at 184-91; Pl.'s Exs. 4, 7, 8, 10, 11, & 12). Additionally, Liggins testified regarding records he obtained from private companies reflecting that Berry was the registrant for many domain names, including directbenefitsonline.com, citywestfinancial.com, and wkmsinc.com. (Id. at 193-94; Pl.'s Exs. 14 & 15).

VIII. The Merits of the FTC's Claims

Section 5(a) of the FTCA, 15 U.S.C. § 45(a), provides in part that "unfair or deceptive acts or practices in or affecting commerce[] are . . . unlawful." In Count I, the FTC alleges that the Defendants engaged in unfair billing practices in violation of this section by obtaining consumers' bank account information and debiting those accounts without the consumers' consent. The FTC alleges in Count II that the Defendants engaged in deceptive acts in violation of this section by failing to adequately

B. Unfair Billing Practices (Count I)

An "unfair practice" under § 5(a) is "one that '[1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition.'" FTC v. Accusearch Inc., 570 F.3d 1187, 1193 (10th Cir. 2009) (alterations in original) (quoting 15 U.S.C. § 45(n)). An unfair practice does not require knowledge of consumer harm. FTC v. Neovi, Inc., 604 F.3d 1150, 1156 (9th Cir. 2010).

"enter" after a pop-up box appeared. As aptly explained by FTC Investigator Tyndall during his testimony, the application process and the pop-up box conveyed the impression that selecting "OK" would continue the applicant on the path that the applicant was already on—submitting a loan application without enrolling in a discount program or agreeing to a debit from a bank account that was supposed to used for direct deposit of a payday loan. Moreover, the pop-up box Tyndall encountered during his first undercover buy did not disclose that the consumer's bank account would be charged for the membership fee. (Pl.'s Ex. 35 at B5).

I agree with the FTC's characterization that the Defendants took advantage of financially distressed consumers who went to websites seeking payday loans to cover immediate expenses, only to end up having debits to their bank accounts that sometimes resulted in overdraft charges in addition to the initial charges themselves. Consumers incurred charges for products and services they were not seeking, did not want or need, could not afford, and did not intend to purchase. And, the fact that many customers were able to—eventually—obtain refunds from Defendants does not render the injury avoidable. Cf. Neovi, 604 F.3d at 1158 ("'It is likely that some consumers never noticed the unauthorized withdrawals. Even if the consumer did notice, obtaining reimbursement required a substantial investment of time, trouble, aggravation, and money. . . . Regardless of whether a bank eventually restored consumers' money, the consumer suffered unavoidable injuries that could not be fully mitigated.'" (quoting district court decision)).

Third, the substantial injury to consumers was not outweighed by countervailing benefits. Defendants' own evidence suggests that the vast majority of the more than

628,000 consumers who were enrolled in the discount programs never used any of the discount offerings. Wood testified that there were 26,616 unique visitors to the Direct Benefits Online website over an eleven-month period, and only a fraction of those logged in—with a membership name and password they received at enrollment—on sections of the site such as "staff picks," "coupons," and "vouchers" to view or possibly use the discounts available to them.[7] (Tr. Day 3 at 23-25; Defs.' Ex. 9). Even assuming that some consumers who were enrolled ing a tha

"While proof that consumers actually were deceived is not required, such evidence is 'highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances.'" Grant Connect, 827 F. Supp. 2d at 1215 (quoting Cyberspace.com, 453 F.3d at 1201).

"District courts consider the overall, common sense 'net impression' of the representation or act as a whole to determine whether it is misleading." Commerce Planet, 878 F. Supp. 2d at 1063 (citing FTC v. Gill, 265 F.3d 944, 956 (9th Cir. 2001)). "'A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.'" Grant Connect, 827 F. Supp. 2d at 1214 (quoting Cyberspace.com, 453 F.3d at 1200).

The FTC has established that Defendants engaged in deceptive practices in violation of § 5(a) by failing to adequately disclose material information on the websites. The operation of the pop-up box and manner in which consumers were enrolled in the discount programs was likely to mislead reasonably-acting consumers—and did mislead such consumers—in a material way. As demonstrated by the consumer testimony and the thousands of complaints made to Defendants and others, many consumers clearly were deceived and inadvertently became enrolled in Defendants' discount programs. This evidence is highly probative of the websites' tendency to mislead. See Grant Connect, 827 F. Supp. 2d at 1215; Commerce Planet, 878 F. Supp. 2d at 1075 (finding "the evidence of consumer complaints credible and tly

experienced—a large percentage of returns, with half of those returns being

online advertising published in a document called "Dot Com Disclosures."[8] However, I cannot agree.

The "Dot Com Disclosures" guidance explains that "[m]any of the general principles of advertising law apply to Internet ads, but new issues arise almost as fast as technology develops." Dot Com Disclosures at 1. Additionally, "[d]isclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction or to further public policy goals, must be clear and conspicuous." Id. Factors considered in determining whether disclosures are likely to be clear and conspicuous include: "the *placement* of the disclosure in an ad"; "its *proximity* to the relevant claim"; "the *prominence* of the disclosure"; "whether items in other parts of the ad *distract attention* from the disclosure"; and "whether the language of the disclosure is

below before pressing OK," suggesting that the next step in the loan application process was to press "OK," which in at least some instances was preselected and highlighted.[9] Some consumers testified that they pressed the OK button believing that by doing so, all they

Although Defendants assert that the text of the pop-up box was in plain English, in a legible font, and not difficult to read, the pop-up box was confusing, distracting, and counterintuitive in its operation. The pop-up box obscured the banner ad by being on top of it, and the directions in the box to "read before pressing OK" suggested that ultimately users should press OK. Moreover, the Thrifty Dial pop-up box that Tyndall encountered during his first controlled buy did not even disclose in any terms that the consumer's bank account would be debited for the membership charge. (See Pl.'s Ex. 35 at B5). And, while Defendants claimed that their "hands were tied" by the "OK" and "Cancel" buttons in the confirm box, Defendants chose to use this type of box on the websites, and they admittedly retained control over the content of the text in the confirm box. Defendants may not properly blame the standard confirm box button labels for the shortcomings of their disclosures.

In sum, the evidence presented at trial establishes that Defendants did not adequately disclose to consuendership

enterprise' or a 'maze' of integrated business entities, the FTC Act disregards corporateness." FTC v. Wash. Data Res., 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012), aff'd, 704 F.3d 1323 (11th Cip

analysis. The entities formally may be separate corporations[] but operate as a common enterprise." Grant Connect, 827 F. Supp. 2d at 1218.

Applying these standards to the facts of this case, the four corporate entities—Direct Benefits Group, Voice Net Global, Solid Core, and WKMS—operated as a common enterprise such that each is liable for the acts of the others. The two individual Defendants were each sole owners and principals of two of the four corporate entities, were close working partners with each other, and were involved with one another's companies. They and their companies operated out of the same office space in Bluffdale, Utah with common employees and shared equipment, and they worked together in enrolling customers in the discount programs via the payday loan websites.

The corporate entities worked cooperatively and complemented one another in inducing consumers to enroll in the discount club products. WKMS operated the payday loan application websites where consumers became enrolled in the discount clubs of Direct Benefits Group and Voice Net Global, and Solid Core supplied employees and operational, administrative, and technological services to Direct Benefits Group, Voice Net Global, and WKMS. See Network Servs. Depot, 617 F.3d at 1143 (finding common enterprise where "companies pooled resources, staff, and funds; they were all owned and managed by [same owner] and his wife; and they all participated to some extent in a common venture to sell internet kiosks"); Wash. Data Res., 856 F. Supp. 2d at 1271-72 (finding common enterprise where entities had common employees and officers, commingled funds, shared advertising, and "failed to recognize a distinct corporate demarcation between each company").

Although WKMS's payday loan websites could have operated–and, for a time,

apparently did operate—without the discount club "upsells" being included on them, this circumstance does not prevent WKMS from being

In sum, considering the operation of the companies as a whole, all four functioned as a common enterprise with regard to enrollment of consumers in the discount clubs and debiting of their bank accounts. Thus, each entity is responsible for the acts of the others.

X. Individual Liability

The FTC also seeks to hold Wood and Berry individually liable for the § 5(a) violations of the corporate entities. In order to establish individual liability under the FTCA—including liability for monetary equitable relief—"'the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them . . . . The FTC must then demonstrate that the individual had some knowledge of the practices.'" FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (alteration in original) (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989)); accord Nat'l Urological Grp., 645 F. Supp. 2d at 1206-07; Ivy Capital, 2013 WL 1224613, at *15 ("It is appropriate to impose equitable monetary relief against a defendant if . . . the individual had some knowledge of the company's deceptive acts or practices."). The FTC established these elements in this case as to Defendants Wood and Berry, and accordingly both are individually liable for the violations by the corporate entity Defendants.

First, although the FTC need only show either authority to control or direct participati–6WÖ2P

corporate policy, including assuming the duties of a corporate officer." Amy Travel, 875 F.2d at 573. By their own testimony, Wood and Berry were actively involved in the affairs of these businesses

requisite knowledge under section 5(a). . . . Good faith is . . . irrelevant to the question of knowledge.").

Thus, the FTC has established a basis for the imposition of both injunctive relief and monetary equitable relief against the individual Defendants along with the corporate entities.

XI. Remedies

The FTC seeks both a permanent injunction and monetary equitable relief against the Defendants. As set forth below, I conclude that both of these requested remedies are appropriate in this case.

A. Permanent Injunction

Under § 13(b) of the FTCA, the FTC "may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). "[P]ermanent injunctive relief is appropriate if 'the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.'" FTC v. USA Fin., LLC, 415 F. App'x 970, 975 (11th Cir. 2011) (quoting SEC v. Caterinicchia, 613 F.2d 102, 105 (5th Cir. 1980)). "The Court examines the totality of the circumstances involved and a variety of factors in determining the likelihood of future misconduct." Commerce Planet, 878 F. Supp. 2d at 1086. "Nonexhaustive factors include the degree of scienter involved, whether the violative act was isolated or recurrent, whether the defendant's current occupation positions him to commit future violations, the degree of harm consumers suffered from the unlawful conduct, and the defendant's recognition of his own culpability and sincerity of his assurances, if any, against future violations." Id.

Here, the violative acts took place over a two-year period, and consumers suffered

significant harm. Addition

a net revenue amount of $9,512,172. (See Pl.'s Ex. 33; Tr. Day 3 at 125-29 (Wood Test.)). Thus, equitable monetary relief of $9,512,172 is appropriate, and Defendants shall be jointly and severally liable for this amount.

XII. Conclusion

For the foregoing reasons, I find in favor of the FTC and against all of the Defendants on both counts of the Complaint for unfair and deceptive practices under § 5(a) of the FTCA. The Defendants acted as a common enterprise, and the individual Defendants are also liable for the violations of the corporate entities. The FTC established entitlement to permanent ins are alst